(2)

89-5295

IN THE SUPREME COURT OF THE UNITED STATES

NO. A 939

JEROME MALLETT,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

NANCY A. MCKERROW
OFFICE OF STATE PUBLIC DEFENDER
209B EAST GREEN MEADOWS ROAD
COLUMBIA, MISSOURI 65203-3698
(314) 442-1101

Counsel for Petitioner

Donald L. Catlett
Of Counsel

RECEIVED
AUG 7 1989
OFFICE OF THE CLERK
SUPREME COURT, U.S.

41 pp

INDEX

	Page
Index	i
Table of Authorities	ii
Petition for Writ of Certiorari	1
Opinion Below	1
Jurisdiction	2
Constitutional Provisions	2
Questions Presented for Review	3

1. What standard is required to be used in determining if a trial judge has violated a defendants right to equal protection as provided by the Fourteenth Amendment, when the judge has changed the venue of a case of First Degree Murder involving a black defendant to an all white county?

2. Are the due process clauses of the Fifth and Fourteenth Amendments violated when the Supreme Court of Missouri reverses a hearing judge who determines that a change of venue from a county with blacks in the population, to an all white county, under certain circumstances, violated due process?

Statement of the Case	3
Reasons to Grant the Writ	6
Conclusion	11
Appendix	12

TABLE OF AUTHORITIES

	Page
Cases	
Alexander v. Louisiana, 405 US 625, (1972)	6, 7
Avery v. Georgia, 345 US 559 (1953)	6
Batson v. Kentucky, 476 US 79, (1986)	4, 6, 7
Kessler v. State, 524 S.W.2d 221, (Mo.App. 1975)	9
Mallett v. State, 769 S.W.2d 77, (Mo.banc 1989)	1
McClesky v. Kemp, 481 US ___, (1987)	6
Pool v. State, 670 S.W.2d 210, (Mo.App. 1984)	9
Sanders v. State, 738 S.W.2d 856, (Mo.banc 1987)	9
Stokes v. State, 688 S.W.2d 19, (Mo.App. 1985)	9
State v. Caffey, 438 S.W.2d 167, (Mo. 1969)	10
Strauder v. West Virginia, 100 Us 303, (1880)	6
Swain v. Alabama, 380 US 202 (1965)	7
Constitutional Provisions	
United States Constitution, Amendment V	2, 9
United States Constitution, Amendment XIV	2, 9
Statutes	
28 U.S.C. Section 1257	2
Rules	
Missouri Supreme Court Rule 27.26 (repealed)	2, 4, 9
Missouri Supreme Court Rule 32.03	2, 3, 4, 7, 10
Missouri Supreme Court Rule 32.04	2, 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

NO. A 939

JEROME MALLETT,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

Jerome Mallett, Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Missouri, in the case styled "Jerome Mallett v. State of Missouri, 769 S.W.2d 77, (Mo.banc 1989)."

LIST OF PARTIES

The Petitioner, Jerome Mallett, appears through Nancy A. McKerrow, Office of State Public Defender, 209B East Green Meadows Road, Columbia, Missouri 65203-3698.

Respondent, State of Missouri, appears by the Honorable William L. Webster, Attorney General of Missouri, P.O. Box 899, Jefferson City, Missouri 65102.

OPINION BELOW

The opinion of the Supreme Court of the State of Missouri, in the case styled "Jerome Mallett v. State of Missouri, 769 S.W.2d 77, (Mo.banc 1989)" the case for which certiorari is being sought, was filed on April 18, 1989, and may be found in the Appendix at pages 1-17. Counsel for Petitioner timely filed a Motion for Rehearing (App. 18-21), which was denied on May 16, 1989. Thereafter, on May 17, 1989, the Missouri Supreme Court set Petitioner's death penalty execution date at May 31, 1989 (App. 23-25).

JURISDICTION

On April 18, 1989, an opinion rendered by the Supreme Court of Missouri reinstated Petitioner's judgment and conviction for Capital Murder and his sentence of death (App. 1-17). Counsel for Petitioner timely filed a Motion for Rehearing (App. 18-21), which was denied on May 16, 1989 (App. 22). On May 17, 1989, the Missouri Supreme Court set Petitioner's execution date for May 31, 1989 (App. 23-25). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States, which provides, in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

and the Fourteenth Amendment to the Constitution of the United States, which provides, in pertinent part:

> [N]or shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

This case also involves the following provisions of the Missouri Supreme Court Rules, which are set forth in the Appendix: Mo. Sup. Ct. Rule 27.26 (repealed)

> (j) Appellate review (of postconviction judgments) shall be limited to a determination of whether the findings, conclusions, and judgment of the trial court are clearly erroneous.

Mo. Sup. Ct. Rule 32.03

> (a) A change of venue shall be ordered in any criminal proceeding pending in a county having seventy-five thousand or fewer inhabitants upon the filing of a written application therefor by the defendant.
> (c) If a timely application is filed, the court shall order the case transferred to some other county convenient to the parties, first giving all parties an opportunity to make suggestions as to where the case should be sent.

Mo. Sup. Ct. Rule 32.04

> (a) Upon written application of the defendant, a change of venue may be ordered in any criminal proceeding for the following reasons:
> 1. that the inhabitants of the county are prejudiced against the defendant; or

2. that the state has an undue influence over the inhabitants of the county.

QUESTIONS PRESENTED FOR REVIEW

1. What standard is required to be used in determining if a trial judge has violated a defendants right to equal protection as provided by the Fourteenth Amendment, when the judge has changed the venue of a case of First Degree Murder involving a black defendant to an all white county?

2. Are the due process clauses of the Fifth and Fourteenth Amendments violated when the Supreme Court of Missouri reverses a hearing judge who determines that a change of venue from a county with blacks in the population, to an all white county, under certain circumstances, violated due process?

STATEMENT OF THE CASE

The petitioner was charged with First Degree Murder in Perry County, Missouri and brought before the Honorable Stanley Murphy for consideration of the defendants Motion for Change of Venue by right pursuant to Rule 32.03 Mo. Rules of Ct. Both the state and the defendant offered several counties as alternatives to the court. Defense counsel expressed a concern that the county chosen include members of the defendants race. Judge Murphy indicated he had a county in mind and would notify the counsel after checking if the county had proper accomodations for a lengthy trial. Judge Murphy later announced by mail that the case would be moved to Schuyler County.

Perry County is found in the southeast corner of Missouri and has a small black population. Schuyler County is found in the far north-central portion of the state and has no blacks in the county, has had no blacks on any jury or jury panel in remembered history.

The cause was transferred to the Honorable E. Richard Webber of the Circuit Court of Schuyler County. A Motion for Change of Venue for cause, pursuant to Rule 31.04 Mo. Rules of Ct. was presented to Judge Webber prior to trial, stating, the absence of members of the defendant's race, in the county, as a reason for requesting the change. This motion was denied by Judge Webber.

Petitioner was tried, convicted and sentenced to death by the all white jury in Schuyler County. Judge Webber imposed the death penalty on March 7, 1986.

Petitioner filed a direct appeal, which was denied and the sentence of death upheld on June 16,1987 with three dissenting justices. A Motion for rehearing was filed and denied on July 14, 1987.

On November 25, 1987 the movant filed a Motion to Vacate pursuant to Rule 27.26 Mo. Rules of Ct. in Schuyler County, Mo. Counsel was appointed to represent the movant and a Supplemental Motion to Vacate was filed. A hearing was held on the motion before the Honorable Ronald Belt, Special Judge, on May 27, 1988. Judge Belt entered his Findings of Fact and Conclusions of Law on June 6, 1988 in which he ordered a new trial for the petitioner.

Judge Belts findings ruled in favor of the State on several issues but found that the defendants rights pursuant to due process had been violated due to the change of venue. The court cited the following circumstances to show that the trial had violated the notion of fundamental fairness: 1) Rule 32.03 (change of venue) is a procedure that allows those with the intent to discriminate to do so; 2) the choice of Schuyler County was arbitrary; 3) the defendant was not given an opportunity to be heard concerning the change to Schuyler County; 4) the change denies the petitioner of the opportunity of members of his own race (blacks) serving on his jury; and 5) the fact that the case involved a black man killing a white man.

Judge Belt further found that the defendant's equal protection rights had been violated by the changing of venue to Schuyler County. The court found that Judge Murphy's act of assigning the case to Schuyler County was state action, then applied the standards of Batson v. Kentucky, 476 US 79, 90 L.Ed. 2d 69 (U.S. 1986) to make a determination that purposeful discrimination existed. The factors cited, by Judge Belt, to

raise an inference of purposeful discrimination, were: 1) that the case involved a cross-racial murder; 2) defense counsel had no opportunity to object to the change; 3) counties which were of equal convenience to witnesses and equally free of pretrial publicity; were of equal, greater or less distance from Perry County; and which included blacks were available; 4) no specific or compelling reason existed to send the case to Schuyler County; 5) no blacks were living in Schuyler County; 6) petitioner is black; and 7) that the defense expressed specific concern to move to a county that included blacks. Judge Belt found that an inference of purposeful discrimination had been established and that no evidence was presented to rebut said inference.

Judge Belt also found that appellate counsel had been ineffective in failing to brief on appeal an instructional error.

The State of Missouri appealed the findings of Judge Belt to the Court of Appeals, Western District and an order from the Supreme Court of Missouri, issued at that time, transferred all Capital murder appeals of post-conviction proceedings to the Supreme Court. This petitioner filed a cross-appeal concerning those matters denied by Judge Belt. The appeal was heard and the Supreme Court of Missouri reversed the findings of Judge Belt with regard to the granting of the new trial and upheld those points ruled against the petitioner. This opinion was filed April 18, 1989 and the Motion for Rehearing was filed and denied on May 16, 1989.

The Supreme Court of Missouri set an execution date for the petitioner for May 31, 1989.

REASONS TO GRANT THE WRIT

1. THE STANDARD THAT SHOULD BE APPLIED IN DETERMINING IF A TRIAL JUDGE HAS VIOLATED THE EQUAL PROTECTION CLAUSE, WHEN GRANTING A CHANGE OF VENUE, SHOULD BE THE STANDARD USED IN DETERMINING IF A PROSECUTING ATTORNEY HAS VIOLATED THE EQUAL PROTECTION CLAUSE IN THE USE OF PREEMPTORY CHALLENGES ON JURY SELECTION, AS BOTH PROCEDURES ARE NOT RACE NEUTRAL AND HAVE A GREAT IMPACT ON THE RACIAL MAKEUP OF THE JURY.

Judge Belt, the postconviction hearing judge, accepted as the proper standard for review of an equal protection question concerning change of venue as that which was set out in Batson v. Kentucky, 476 US 79, 106 S Ct 1712, 90 L Ed 2d 69 (1986). The state argued and the Missouri Supreme Court held that for an equal protection violation to exist there must be a finding of purposeful discrimination on the part of the judge who granted the change of venue; pointing to McClesky v. Kemp, 481 US ____, 107 S Ct 1756, 95 L Ed 2d 262 (1987) and Strauder v. West Virginia, 100 US 303, 25 L Ed 664 (1880) as authority. Petitioner submits that the application of the standard in Batson is not inconsistent with the requirement of purposeful discrimination. The courts have held that in the area of jury composition an inference of purposeful discrimination could be established by a showing of disproportionate representation plus practices that provide the opportunity for discrimination, Alexander v. Louisiana, 405 US 625, 31 L Ed 2d 536, 92 S Ct 1221 (1972) or by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose, Batson, supra at 94.

This court has repeatedly found that practices in the selection process of juries which exclude jurors due to race are violative of the equal protection clause. Even if those procedures are racially neutral upon their face. Avery v. Georgia, 345 US 559, 562 (1953).

In the case at bar, is a practice which on its face allows those with a discriminatory intent to practice such. Rule 32.03 Mo. Rules of Ct. allows a judge complete discretion in determining what county to send a case. There is no vehicle by which to challenge the motives of the judge or the rationale of the move prior to trial. All constitutional restrictions placed on the venire selection process, the petit selection process and the jury composition; designed to protect against the exercise of discrimination based on race; can be circumvented by the selection of a county which has no blacks as residents.

The cases that concern the equal protection clause as it applies to the jury selection process establish a method of presenting a prima facie case of purposeful discrimination and the burden then falls on the acting state official to show race neutral reasons for their actions. Batson, supra; Alexander v. Louisiana, supra; Swain v. Alabama, 380 US 202 (1965). The petitioner submits that this method of establishing a prima facie case should the standard for reviewing a change of venue. Factors to be considered in that review would include dispproportionate representation and whether the procedures employed were race neutral.

Judge Belt, who presided over the postconviction hearing, found that based upon the totality of the circumstances an inference of purposeful discrimination existed and that the state had failed to rebut that inference therefore a violation of the equal protection clause had occurred. To support his finding Judge Belt found:

1) that the case involved a cross-racial murder; 2) defense counsel had no opportunity to object to the change; 3) counties which were of equal convenience to witnesses and equally free of pretrial publicity; were of equal, greater or less distance from Perry County; and which included blacks were available; 4) no specific or compelling reason existed to send the case to Schuyler County; 5) no blacks were living in Schuyler County; 6) petitioner is black; and 7) that the defense expressed specific concern to move to a county that included blacks.

2. WHEN THE JUDGE AT THE HEARING OF A MOTION FOR POST-CONVICTION RELIEF DETERMINES THAT THE CHANGING OF VENUE TO AN ALL WHITE COUNTY, UNDER THE PROCEDURES EMPLOYED IN THIS CAUSE, VIOLATES THE NOTIONS OF FUNDAMENTAL FAIRNESS; AND MISSOURI LAW REQUIRES THAT THE FINDINGS OF THE HEARING COURT BE AFFORDED DEFERENCE; THEN THE REVERSAL OF THE HEARING COURTS FINDINGS, WHEN THOSE FINDINGS ARE SUPPORTED BY FACT AND CORRECT BY LAW; IS A VIOLATION OF THE PETITIONERS DUE PROCESS RIGHTS AS PROTECTED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Petitioner submits that the Missouri Supreme Court's decision in his case which reverses the determination of the postconviction hearing court violates the due process clause of the Fifth and Fourteenth Amendments in that the hearing court ruled that the petitioners trial for capital murder was fundamentally unfair.

Rule 27.26(j) Mo. Rules of Ct. (1987) limits appeals of postconviction rulings to a determination of whether the findings, conclusions, and judgment of the trial court are clearly erroneous. Case law has described this standard as whether; "the appellate court is left with the definite and firm impression that a mistake has been made." Sanders v. State of Missouri, 738 S.W.2d 856, (Mo.banc 1987), quoting, Stokes v. State of Missouri, 688 S.W.2d 19, 21 (Mo.App., E.D. 1985). In reviewing a ruling on a Motion to Vacate the findings of the motion court are presumptively correct and are to be sustained unless clearly erroneous. Kessler v. State of Missouri, 524 S.W.2d 221, 222 (Mo.App. 1975). The credibility of the witnesses, is for the trial court's determination. (The court's) findings relative thereto are entitled to deference. Pool v. State of Missouri, 670 S.W.2d 210, 211 (Mo.App., S.D. 1984).

In finding the following circumstances:

1) Rule 32.03 (change of venue) is a procedure that allows those with the intent to discriminate to do so; 2) the choice of Schuyler County was arbitrary; 3) the defendant was not given an opportunity to be heard concerning the change to Schuyler County; 4) the change denies the petitioner of the opportunity of members of his own race (blacks) serving on his jury; and 5) the fact that the case involved a black man killing a white man:

Judge Belt ruled that the defendant's trial violated the notions of fundamental fairness, and thereby violated due process. These findings were supported by fact and permissible by law. The standard for a review of due process violations in criminal cases is:

> "...the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial." State of Missouri v. Caffey, 438 S.W.2d 167, 172 (Mo. 1969)

The hearing court having factually found that the due process rights of the defendant have been violated, that finding being supported by evidence and law, the actions of the Supreme Court to reverse said ruling denies the petitioner of his due process rights.

CONCLUSION

For the reasons set forth in the Petition, Petitioner respectfully submits that the Court should issue a writ of certiorari to the Missouri Supreme Court in order to review the issues raised herein.

Respectfully submitted,

Nancy A. McKerrow
Office of State Public Defender
209B East Green Meadows Road
Columbia, Missouri 65203-3698
(314) 442-1101

Counsel for Petitioner

Donald L. Catlett
Of Counsel

IN THE
SUPREME COURT OF THE UNITED STATES

NO. A 939

JEROME MALLETT,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

APPENDIX
TO PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF MISSOURI

Nancy A. McKerrow
Office of State Public Defender
209B East Green Meadows Road
Columbia, Missouri 65203-3698
(314) 442-1101

Counsel for Petitioner

Donald L. Catlett
Of Counsel

TABLE OF CONTENTS

	Page
OPINION BELOW	1
MOTION FOR REHEARING	18
ORDER DENYING MOTION FOR REHEARING	22
WARRANT OF EXECUTION	23
RELEVANT MISSOURI RULES OF COURT	26

DUPLICATE
OF FILING ON
APR 18 1989
IN OFFICE OF
CLERK SUPREME COURT

Supreme Court of Missouri

en banc

JEROME MALLETT,

Respondent/cross-appellant,

vs.

STATE OF MISSOURI,

Appellant/cross-respondent.

No. 70923

APPEAL FROM THE CIRCUIT COURT OF SCHUYLER COUNTY
Honorable Ronald M. Belt, Special Judge

Movant was convicted of first degree murder for killing Missouri State Highway Patrolman James Froemsdorf and was sentenced to death in the Circuit Court of Schuyler County. His conviction and sentence were affirmed on direct appeal in State v. Mallett, 732 S.W.2d 527 (Mo. banc 1987), where the facts surrounding the crime are detailed. Movant subsequently instituted this Rule 27.26 proceeding, and, after two written amendments by movant's counsel, an evidentiary hearing was held before the Honorable Ronald M. Belt, who was assigned the case as Special Judge. Finding three of movant's claims meritorious, Judge Belt entered an order vacating movant's sentence and requiring that movant be "tried in a venue where there is a possibility of blacks being on the jury." The state appealed the vacation of the sentence and movant cross-appealed, contending

the motion court erred in not granting relief on other grounds alleged in his motion. The Court of Appeals, Western District transferred the appeal prior to opinion in compliance with our policy concerning 27.26 proceedings where the underlying conviction resulted in imposition of the death penalty. We reverse.

The state asserts on appeal that the motion court erred in concluding movant's due process and equal protection rights were violated by the trial court's selection of Schuyler County as the venue for movant's trial and in holding that movant did not receive effective assistance of counsel because of counsel's failure to object to a mitigating circumstances instruction that contained an erroneously numbered reference to another instruction. In examining the contentions of error, we bear in mind that appellate review of the motion court's decision in a 27.26 proceeding is limited to a determination of whether its findings, conclusions and judgment are clearly erroneous. Sanders v. State, 738 S.W.2d 856, 857 (Mo. banc 1987).

Initially we consider the questions raised concerning the trial court's transfer of venue to Schuyler County. Trooper Froemsdorf was murdered in Perry County, which is situated along the Mississippi River in Southeast Missouri, and movant was originally brought before the court in that county. Movant requested a change of venue, and after his counsel[1] and the

[1] Movant was represented at trial by Public Defenders Kenny Hulshof, Gary Robbins, and Mary-Louise Moran. We will refer simply to "counsel."

state were unable to reach agreement on venue, each party suggested certain counties of their own preference to Judge Murphy during argument on defendant's motion. The state mentioned Texas, Phelps, Clay, and Clinton Counties, while defense counsel named St. Louis City and the Counties of St. Louis, Jackson, and Boone, then added Buchanan and Adair. Movant's counsel expressed a concern that venue be moved to a community where there was a possibility of blacks appearing on the jury because movant is black. After the discussion Judge Murphy stated that he had in mind a county not included on either list and "very far and north of here." He subsequently entered an order transferring venue to Schuyler County, located along the Iowa border and containing, according to 1980 census statistics, 4964 white persons and three black persons. See U. S. Bureau of Census, Census of Population and Housing (1980). Judge Webber, who presided during the trial, testified at the 27.26 hearing he was not aware of any blacks living in Schuyler County at the time of movant's trial.

Movant asserted in his 27.26 motion that he was denied due process by the change of venue, and the motion court agreed, stating "an arbitrary choice of venue without giving the defense an opportunity to be heard; and the fact that the county chosen denies the movant of (sic) any opportunity of members of his own race being on the jury panel; and the fact that the case involves a black man killing a white trooper which has a high possibility for racial prejudice being a factor; violates the due process clause."

A fundamentally fair trial is the basic requirement of due process, and in most cases a showing of identifiable prejudice to the accused is necessary. Estes v. State of Texas, 85 S. Ct. 1628, 1633 (1965). It is also true that "at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process." Id.; see also Sheppard v. Maxwell, 86 S. Ct. 1507 (1966). However, in this case we believe the motion court clearly erred in concluding movant did not receive a fundamentally fair trial. The lack of potential black jurors and the issue of racial prejudice were discussed at length in our previous opinion on direct appeal of the conviction. In determining whether movant's death sentence was imposed under the influence of passion, prejudice, or the arbitrary factor of race, we stated that the voir dire examination provided "direct evidence that the jurors were not motivated by racism," and "[l]acking any other evidence, defendant urges that this Court assume racial bias because, while he is black and his victim was white, the county in which he was tried had no black residents, which resulted in a jury panel without blacks." Mallett, 732 S.W.2d at 539. We declined "to infer racial prejudice on the part of a jury which sentences a black killer of a white victim to death simply because that jury was drawn from a county which has no black residents[,]" and noted "[t]o hold that racial prejudice may be inferred from the absence of members of the defendant's race on the jury would be, in practical effect, to hold that the

defendant has a right to members of his own race on the jury. A defendant, however, has no right to a jury of any particular racial composition. Taylor v. Louisiana, 419 U.S. 522, 538, 95 S. Ct. 692, 701, 42 L. Ed. 2d 690 (1975); State v. Blair, 638 S.W.2d 739, 753 (Mo. banc 1982), cert. denied, 459 U.S. 1188, 103 S. Ct. 838, 74 L. Ed. 2d 1030 (1983)." Id. at 540. We further rejected an argument that the trial of a black in a county with no black residents inherently results in a jury motivated by prejudice. Id. The fact that the murder victim was white and defendant was tried in a county without blacks is insufficient to establish identifiable prejudice to the defendant, and we do not find the change of venue procedure utilized here created such a high probability of prejudice that it was inherently lacking in due process; indeed, as previously discussed, all the evidence, including the transcript of voir dire, indicates defendant received a fair trial by an impartial jury.

The third factor mentioned by the motion court was the purported lack of opportunity for the movant to be heard. We note in this regard that movant was able to, and did, express his venue preferences as well as his concern that there be potential black jurors. We see little significance in the fact there was no further hearing after venue was decided. The procedure here followed that specified in Rule 32.03. The motion court clearly erred in finding that movant was denied due process because the venue was changed to Schuyler County.

4

1

5

We next address the state's contention that the motion court erred in concluding movant was denied equal protection by the change of venue. To establish an equal protection violation, a defendant must prove the existence of purposeful discrimination and that the purposeful discrimination had a discriminatory effect on him. McCleskey v. Kemp, 107 S. Ct. 1756, 1766 (1987). Assuming arguendo that a change of venue from a county with few blacks to one with none has a discriminatory effect on a defendant for purposes of equal protection analysis, we find a complete void of evidence that Judge Murphy's venue decision was animated by a discriminatory purpose. Movant has not shown that Judge Murphy treated him differently than white defendants or that Judge Murphy systematically used the change of venue procedures to ensure that black defendants would be tried by white juries. Nor is there evidence indicating Judge Murphy was aware of the racial composition of Schuyler County; however, if so, "discriminatory purpose implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker ... selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Personnel Administrator of Massachusetts v. Feeney, 99 S. Ct. 2282, 2296 (1979). See also McCleskey, 107 S. Ct. at 1769; Wayte v. United States, 105 S. Ct. 1524, 1532 (1985).

The motion court relied on Batson v. Kentucky, 106 S. Ct. 1712 (1986), in concluding "this court need not find that Judge

Murphy acted with a discriminatory purpose, (however,) this court finds that an inference of discriminatory purpose exists." (Emphasis in original.) Batson, of course, involved the use of peremptory strikes by prosecutors to exclude blacks from serving on juries, and the Supreme Court held there that a defendant may make a prima facia case of discrimination by establishing: 1) he is a member of a cognizable racial group and the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race; 2) the practice in question permits "those who are of a mind to discriminate to discriminate," and 3) these facts and other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the jury on account of their race. Id. at 1723. Once a prima facia case is established, the prosecution may come forward with a neutral explanation that rebuts the inference. Id. We find Batson of limited usefulness in analyzing movant's claim, which involves procedures for changing venue and has nothing to do with prosecutorial discretion or peremptory challenges.[2] As noted in McCleskey, 107 S. Ct. at 1767, jury selection is one of the "limited contexts" in which statistics have been accepted as

[2] The present claim, based upon a single action by the decisionmaker, would be more nearly analagous to a Batson claim involving the use of one peremptory strike by the prosecutor, a situation in which a Batson argument would be unlikely to prevail. But even in such a case the analogy is weakened by the fact the prosecutor as an advocate seeks all legitimate advantage for his cause, in contrast to the trial judge who in response to the defendant's motion for change of venue is not called upon to make a partisan determination and has no stake in the outcome.

proof of intent to discriminate. Of course, we need not decide whether statistical proof may be accepted in the context of change of venue procedures, for movant has presented none.

The "facts" upon which the motion court based its decision were stated as follows: "1) the case involves a cross-racial murder of a state trooper; 2) the decision of Judge Murphy was made without giving counsel an opportunity to object; 3) counties which were of equal convenience to witnesses; equally free of pre-trial publicity; of equal, greater or less distance; and included blacks were tendered by the defense and prosecution; 4) no specific or compelling reason existed to send the case to Schuyler County; 5) there were no blacks living in Schulyer County at the time of trial; 6) movant is a black man; 7) the defense expressed concern that the county chosen include blacks." These "facts" are wholly inadequate under equal protection precedent to establish even an inference of discriminatory purpose when considered in the context of the "totality of relevant facts". Batson, 106 S. Ct. at 1721. As we stated in our previous opinion on direct appeal, "it can be assumed that venue was changed to Schuyler County in order to get the case moved as far north as possible to a county where reports of Trooper Fromsdorf's killing may have received less attention. There is not the slightest suggestion that race was a consideration in the decision to change the venue to Schuyler County." 732 S.W.2d at 540. Based upon the evidence adduced at the 27.26 hearing, we may now add that Judge Murphy selected a

neutral site not suggested by either party. Movant's evidence falls short of the "exceptionally clear proof" required before it may be inferred that Judge Murphy abused his discretion, McCleskey, 107 S. Ct. at 1769, and the motion court clearly erred in concluding movant was denied equal protection.[3]

We next address the state's contention that the motion court erred in determining movant was denied effective assistance of counsel by counsel's failure to specifically object to an erroneous reference in Instruction No. 24 (MAI-Cr2d 13.44) to Instruction No. 21 (MAI-Cr2d 13.40) instead of Instruction No. 23 (MAI-Cr2d 13.42). MAI-Cr2d 13.44 submits mitigating circumstances to the jury and provides in part: "If you decide that one or more sufficient aggravating circumstances exist to warrant the imposition of death, as submitted in Instruction No. ___, you must then determine whether one or more mitigating circumstances exist which outweigh the aggravating circumstance or circumstances so found to exist." The blank is to be filled in with the number given to the instruction patterned after MAI-Cr2d 13.42, which instructs the jury on weighing both statutory and nonstatutory aggravating factors, see MAI-Cr2d 13.44 note on use 2; however, the trial court erroneously inserted the number

[3] Because we have determined that movant failed to make a prima facia case of purposeful discrimination, we need not decide whether the affidavit of Judge Murphy, which the state sought to introduce after entry of the order vacating the sentence, may be considered. That affidavit is contained in the legal file at pages 69-72, and it not only corroborates the existence of the non-racial factors previously mentioned and apparent from the record, but indicates other legitimate considerations as well. Had movant established a prima facia case, Judge Murphy's

of the instruction patterned after MAI-Cr2d 13.40, which submits statutory aggravating factors.

In order to prevail on a claim of ineffective assistance of counsel, a defendant must establish that his attorney failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances and that he was thereby prejudiced. Sanders, 738 S.W.2d at 857 (citing Strickland v. Washington, 104 S. Ct. 2052 (1984)). In reviewing such claims, a court need not determine the performance component before examining for prejudice, and if it is easier to dispose of the claim on the ground of lack of sufficient prejudice, the reviewing court is free to do so. Id. To establish prejudice, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 104 S. Ct. 2052, 2068 (1984). The motion court apparently found prejudice because "movant was deprived of the right to have the Supreme Court review the error[,]" noting, "This Court cannot speculate as to how the Missouri Supreme Court might have ruled the matter." We hold that the motion court clearly erred in determining that movant was prejudiced by counsel's failure to object to the instruction.

---

affidavit would have been extremely forceful rebuttal evidence.

Movant argues that the erroneous reference in Instruction No. 24 prevented the jury from weighing the mitigating circumstances against the nonstatutory aggravating circumstances and that several of the mitigating circumstances were submitted to address specific nonstatutory aggravating circumstances. The question is what a reasonable juror could have understood the charge as meaning, and if the specific instruction fails constitutional muster we review the instructions as a whole to see if the entire charge delivered a correct interpretation of the law. California v. Brown, 107 S. Ct. 837, 839 (1987). Movant's argument is untenable upon a reading of the instructions given the jury. Instruction No. 26 (MAI-Cr2d 13.46) informed the jury that: "You are not compelled to fix death as the punishment even if you do not find the existence of one or more mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances which you find to exist. You must consider all the circumstances in deciding whether to assess and declare the punishment at death. Whether that is to be your final decision rests with you." If not already clear from Instruction 24, Instruction No. 26 informed the jury they could consider all the circumstances in assessing punishment. Certainly they were not precluded from considering any of the mitigating factors and balancing them against any of the aggravating factors. Furthermore, accepting for the sake of argument movant's contention that the jury would have construed the references in Instruction 24 to "aggravating circumstances" as applying only to

statutory aggravating circumstances, the jury would then have believed they must return a verdict of life imprisonment if they found the mitigating circumstances outweighed the statutory aggravating circumstances, making the nonstatutory aggravating circumstances superfluous at that point in the deliberation. MAI-Cr2d 13.44. Such a reading would be beneficial, not prejudicial, to movant. Movant totally failed to establish a reasonable probability that, but for the failure to object, the outcome would have been different, and the motion court clearly erred in determining that he received ineffective assistance of counsel.

We now turn to the issues raised by movant in his cross-appeal. First, movant contends the motion court erred in concluding his claim of denial of due process in connection with the trial judge's failure to recuse was not cognizable in this 27.26 proceeding because it was abandoned on direct appeal. Rule 27.26(b)(3). Alternatively, the motion court found that Judge Webber was not biased against movant. We believe the motion court did not clearly err in rejecting movant's claim. A proceeding under Rule 27.26 is not a substitute for appeal. O'Neal v. State, 486 S.W.2d 206, 207 (Mo. 1972). "Trial errors cannot be brought within the scope of Rule 27.26 by simply alleging as a conclusion that they result in an unfair or impartial trial, or that they affected constitutional rights." Id. at 208. Although movant attempts to cloak his claim in constitutional attire, he alleges only that there was "an

appearance of impropriety." Furthermore, the very issue movant now seeks to raise was presented in his motion for new trial. We find no clear error in the motion court's ruling on this point.

Movant also challenges the motion court's categorization of his claim concerning the trial court's failure to grant a change of venue from Schuyler County as trial error. Movant asserted he was denied his right to due process by the trial court's denial of his change of venue motion, which was filed on the first day of trial. The essence of movant's claim was addressed and rejected by this Court on direct appeal. Mallett, 732 S.W.2d at 539-40. "[A] matter decided on direct appeal may not be relitigated in post-conviction relief proceedings even if movant offers a different theory." Schlup v. State, 758 S.W.2d 715, 716 (Mo. banc 1988). The motion court did not clearly err in denying movant relief on this claim.

Movant further contends the motion court erred in ruling the statutory aggravating circumstance of "depravity of mind" was not unconstitutionally vague. On direct appeal we found sufficient evidence to support the jury's finding the murder outrageously or wantonly vile, horrible, or inhuman in that it involved depravity of mind. Mallett, 732 S.W.2d at 542. The evidence indicated the victim had been subjected to serious physical abuse and that movant's actions were in callous disregard for the sanctity of human life. State v. Griffin, 756 S.W.2d 475, 489-90 (Mo. banc 1988). The motion court did not err in ruling the aggravating circumstance of "depravity of mind" was

not unconstitutionally vague in this context. Jones v. State, No. 70720, slip opinion at 7-9 (Mo. banc March 14, 1989).

Finally, we address the purported failure of the motion court to rule on movant's claim of ineffective appellate counsel in connection with counsel's decision not to advance his claim concerning the trial court's failure to strike venireman Karen Long for cause.[4] Although the motion court specifically mentioned the claim regarding juror Long, the ruling on that claim is not stated with particularity; however, we hold the findings and conclusions indicate the motion court's rejection of that claim and are sufficient for appellate review.[5] The standard for reviewing a claim of ineffective appellate counsel is essentially the same as that employed with trial counsel: movant is expected to show both a breach of duty and resulting prejudice. Blackmon v. White, 825 F.2d 1263, 1265 (8th Cir.

[4] It is of interest that movant and his trial counsel chose not to utilize a peremptory strike to remove Ms. Long from the jury.

[5] Generally claims of ineffective assistance of appellate counsel are not cognizable in 27.26 proceedings, but are more appropriately presented to the appellate court in the form of a motion to recall mandate. Hemphill v. State, 566 S.W.2d 200, 207-8 (Mo. banc 1978). However, "where an appellate court retains no unique knowledge (emphasis in original) necessary to the disposition of a claim of ineffective assistance of appellate counsel or where an evidentiary hearing may be deemed necessary to the disposition (emphasis ours), a Rule 27.26 motion is the appropriate vehicle for seeking post-conviction relief." Morris v. State, 603 S.W.2d 938, 941 (Mo. banc 1980). Because movant's claim involves failure to brief certain issues on appeal, it would appear at first glance to be analogous to Hemphill. In the interest of judicial economy, and in view of the beneficial evidence presented at the motion hearing, we nonetheless undertake to examine the claim as if properly raised in this proceeding. Buskuehl v. State, 719 S.W.2d 504, 506 (Mo. App. 1986).

1987). There is "no duty to raise every possible issue asserted in the motion for new trial on appeal[,]" Camillo v. State, 757 S.W.2d 234, 241 (Mo. App. 1988), and the motion court noted that appellate counsel has no duty to present non-frivolous issues where appellate counsel strategically decides to "winnow out" arguments in favor of other arguments, citing Jones v. Barnes, 103 S. Ct. 3308, 3312-13 (1983). The court stated: "In light of the fourteen issues presented by appellate counsel on direct appeal, this appears to be exactly what appellate counsel was doing." Despite counsel's decision to select and present the strongest contentions of error, the appellate brief submitted exceeded this Court's 100-page limitation, but was nonetheless accepted and considered. The motion court concluded with regard to the issues movant claimed should have been briefed, "counsel testified that she considered raising each one of them, but declined to do so. She considered those issues weaker than the issues she actually raised on direct appeal." We have examined the transcript of voir dire, as well as counsel's testimony at the 27.26 hearing, and find that appellate counsel did not breach her duty to movant.

For the reasons stated in this opinion, the motion court's order vacating movant's sentence is reversed and his 27.26 motion is overruled.

ALBERT L. RENDLEN, JUDGE

Billings, C.J., Higgins, Covington, JJ., and Maus, Sp.J., concur; Blackmar, J., concurs in separate opinion filed; Welliver, J., dissents in separate opinion filed. Robertson, J., not sitting.

DUPLICATE
OF FILING ON
APR 18 1989
IN OFFICE OF
CLERK SUPREME COURT

Supreme Court of Missouri

en banc

JEROME MALLETT,

Respondent/Cross-Appellant,

vs.

STATE OF MISSOURI,

Appellant/Cross-Respondent.

No. 70923

CONCURRING OPINION

I adhere to the views expressed in my dissenting opinion in *State v. Mallett*, 732 S.W.2d 527, 543 (Mo. banc 1987), and I agree with the conclusion of the court below that the case should have been sent elsewhere for trial when counsel advised the trial judge of the situation in Schuyler County.

The point about venue, however, was ruled adversely to the movant on the initial appeal and constitutes the law of the case, by which I am bound. I see no merit in any of the other grounds urged for upsetting the conviction, and so am obliged to concur in the judgment of reversal.

Charles B. Blackmar, Judge

DUPLICATE
OF FILING ON
APR 18 1989
IN OFFICE OF
CLERK SUPREME COURT

Supreme Court of Missouri

en banc

JEROME MALLETT,

Respondent/cross-appellant,

v.

STATE OF MISSOURI,

Appellant/cross-respondent.

No. 70923

DISSENTING OPINION

I respectfully dissent, as I did in the original review of this case. **State v. Mallett**, 732 S.W.2d 527, 545 (Mo.banc 1982). I agree with the conclusion of the court below that the case should have been sent for trial elsewhere when trial counsel informed the trial judge of the situation in Schuyler County.

WARREN D. WELLIVER, Judge

IN THE MISSOURI SUPREME COURT

JEROME MALLETT,)
Respondent/cross-appellant)
)
v.) No. 70923
)
STATE OF MISSOURI,)
Appellant/cross-respondent.)

MOTION FOR REHEARING

Comes now the Respondent/cross-appellant in this cause and requests this Court to grant a rehearing or in the alternative to reconsider its decision handed down on April 18, 1989. In support thereof the movant alleges the following.

1. Respondent/cross-appellant was convicted of Murder in the First Degree and sentenced to death March 7, 1986. Said conviction was appealed to the Missouri Supreme Court and affirmed at 732 S.W. 2d 527 (Mo. banc 1987).

2. Respondent/cross-appellant filed a Motion to Vacate Sentence pursuant to Rule 27.26 Mo. Rules of Ct. and same was heard by the Honorable Ronald M. Belt on May 27, 1988. Judge Belt filed Findings of Fact and Conclusions of Law on June 6, 1988. Said findings vacated Respondent/cross-appellant conviction on three grounds and denied all other grounds. The State appealed.

3. This court reversed the findings of the post-conviction court and reinstated the conviction and sentence on April 18, 1989.

4. Respondent/cross-appellant requests that the court reconsider its decision on all points and by failing to specifically argue any point does not intend to waive reconsideration or rehearing on any point.

5. This court has overlooked or misinterpreted material matters of law and fact in holding that no violation of due process has occurred in that the findings of a trial judge in a post-conviction hearing is to be granted great deference and overturned only if it is clearly erroneous.

6. This court has overlooked or misinterpreted material matters of law and fact in holding that no violation of equal protection has occurred in that the court has held an anelysis of

the question in a change of venue should be under the McClesky v. Kemp, 107 S. Ct. 1756 (1987) standard.

7. This court has overlooked or misinterpreted material matters of law and fact in holding that no violation of the Sixth and Eighth Amendment of the United States Constitution occurred by the instructional error that was not briefed by appellate counsel.

8. This court has overlooked or misinterpreted material matters of law and fact in holding that no violation of the Sixth Amendment of the United States Constitution occurred by appellate counsel's failure to brief on appeal the failure of the trial court to strike for cause Venireperson Karen Long.

WHEREFORE, it is respectfully requested that this court grant the Respondent/cross-appellant a rehearing or in the alternative reconsider it's opinion.

Donald L. Catlett

DONALD L. CATLETT
MOBAR # 29556
Attorney for
Respondent/cross-appellant
Area 19
210 Adams
Jefferson City, MO. 65101
314-634-7033

A copy of the foregoing was delivered to the Attorney General on this 2nd day of May, 1989.

Donald L. Catlett

IN THE MISSOURI SUPREME COURT

JEROME MALLETT,
Respondent/cross-appellant)
)
v.) No. 70923
)
STATE OF MISSOURI,
Appellant/cross-respondent.)

MOTION FOR REHEARING
SUGGESTIONS IN SUPPORT

Comes now the Respondent/cross-appellant and offers the following suggestions in support of his Motion for rehearing. Failure to argue or offer suggestions concerning any point is not intended to be a waiver of any point on appeal.

With reference to **paragraph 6** of the Motion for rehearing this court held that the standard for analysis of a Change of venue issue within the equal protection clause is the McClesky purposeful discrimination standard. The court further held it would not consider a prima facie analysis as used in Alexander v. Louisiana, 405 US 625, 31 L Ed 2d 536, 92 S Ct 1221 (1972). The standard of purposeful discrimination is required in both analysis and in the Batson analysis relied on by respondent/cross-appellant. The salient question is whether the court will allow establishing a prima facie case of purposeful discrimination by relevant factors such as statistical showings, race-nuetral procedures, opportunity to be heard, etc.

The court stated on page 8 of its opinion that it would not consider if a statistical showing would be accepted in this context as none was presented. Respondent/cross-appellant made a showing that 0% of the population in the county was black (at the time of the trial), 0% of the jury pool was black and 0% of the jurors to serve in the county in the past 20 years were black. If the court is inclined to consider a statistical showing as grounds for a prima facie case of purposeful discrimination the evidence is present to support such a finding.

With reference to **paragraph 8** of the Motion for rehearing this court held that appellate counsel did not breach her duty to respondent/cross-appellant in that she "strategically decided to winnow out arguments in favor of other arguments" (S. Ct. opinion pg. 15) The point in question is one where venireperson Karen Long was not struck for cause after stating that she would require the defendant to present evidence of his innocence

(Direct Appeal Tr. 500). Appellate counsel failed to brief this point on appeal although it was included in the Motion for New Trial. At the hearing on the post conviction motion appellate counsel expressly stated that she did not know why she had not briefed the point on appeal and could find no reason for failing to do so upon review (Post Conviction Tr. 171). This court held that appellate counsel exercised her strategic descretion in deciding not to brief the point, however her testimony under oath indicates otherwise. Respondent/cross-appellant submits that this misinterpretation of a material facts should prompt a rehearing.

RESPECTFULLY SUBMITTED,

Donald L. Catlett

DONALD L. CATLETT
MOBAR # 29556
Attorney for
Respondent/cross-appellant
Area 19
210 Adams
Jefferson City, MO. 65101
314-634-7033

A copy of the foregoing was delivered
to the Attorney General on this
2nd day of May, 1989.

Donald L. Catlett

MAY 17 REC'D

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI
65102

THOMAS F. SIMON
CLERK

TELEPHONE
(314) 751-4144

May 16, 1989

Mr. Donald Lee Catlett
210 Adams
Jefferson City, Missouri 65101

Re: Jerome Mallett vs. State of Missouri,
No. 70923

Dear Mr. Catlett:

This is to advise that the Court has this day entered the following Order in the above-entitled cause:

"Respondent's motion for rehearing overruled."

Very truly yours,

Thomas F. Simon

Clerk

cc: Attorney General
(Mr. Stephen D. Hawke)

MAY 18 REC'D

No. 68030

In the Supreme Court of Missouri

May Session 19 89

State of Missouri, Respondent,
vs.
Jerome Mallett, Appellant.

WARRANT OF EXECUTION

Now on this day, Jerome Mallett, being in custody pursuant to a sentence of death heretofore rendered against him by the Circuit Court of Schuyler and affirmed by this Court, it is therefore considered, ordered and adjudged by this Court that Jerome Mallett be and remain in the custody of the chief administrative officer of the institution where the appellant is incarcerated, and there, within the walls of the institution, on the 31st day of May, 1989, under the supervision and direction of said chief administrative officer, shall suffer death. Said chief administrative officer is directed to make return of this warrant to this Court showing the time, mode and manner in which this warrant was executed.

STATE OF MISSOURI—Set.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May *Session thereof, 19* 89 *, and on the* 17th *day of* May *19* 89 *, in the above entitled cause.*

Given under my hand and seal of said Court, at the City of Jefferson, this 17th *day of* May *19* 89 .

Thomas F. Simon *Clerk*

D.C.

Supreme Court of Missouri

en banc

May 17, 1989

STATE OF MISSOURI,
Respondent,

vs. No. 68030

JEROME MALLETT,
Appellant.

BE IT REMEMBERED, that on March 7, 1986, the Circuit Court for the County of Schuyler entered its judgment finding Jerome Mallett guilty of first degree murder and fixing his punishment at death; and

Thereafter, on March 24, 1986, appellant's notice of appeal from said conviction and sentence was filed in this Court; and

Thereafter, on June 16, 1987, this Court affirmed appellant's conviction and sentence; and

Thereafter, on July 14, 1987, this Court overruled the appellant's motion for rehearing and set appellant's date of execution for September 17, 1987; and

Thereafter, on September 11, 1987, appellant's execution was stayed by this Court; and

Thereafter, on November 6, 1987, said stay was terminated pursuant to the denial of appellant's petition for writ of certiorari by the Supreme Court of the United States; and

Thereafter, Jerome Mallett filed a post-conviction motion under this Court's rules in the circuit court of competent jurisdiction; and

Thereafter, said motion was sustained by the circuit court, and an appeal of said ruling was filed in this Court; and

Thereafter, on April 18, 1989, this Court reversed the judgment of the circuit court sustaining Jerome Mallett's post-conviction motion filed pursuant to this Court's rules; and

Thereafter, on May 16, 1989, this Court overruled Jerome Mallett's motion for rehearing;

NOW, THEREFORE, a warrant is directed to issue to the director of the department of corrections and human resources and the chief administrative officer of the institution in which Jerome Mallett is incarcerated for the execution of the said Jerome Mallett on May 31, 1989.

Day - to - Day

William H. Billings,
Chief Justice